II. ARTICLE 36 PROVIDES JUDICIALLY ENFORCEABLE RIGHTS

This Court has provisionally accepted in *Breard v. Greene*[14] that the VCCR confers on a foreign national a right to consular assistance following arrest. The ICJ in *LaGrand (F.R.G. v. U.S.)*, stated that Article 36 provides a right invocable by the foreign national. Article 36 provides, in part: "The said authorities shall inform the person concerned without delay of his rights under this subparagraph." The ICJ confirmed that Article 36 creates a right for a foreign national both because of this plain language, and "[m]oreover, under Article 36, paragraph 1 (c), the sending State's right to provide consular assistance to the detained person may not be exercised 'if he expressly opposed such action.' The clarity of these provisions, viewed in their context, admits of no doubt."[15]

III. JUDICIAL REVIEW OF CONVICTION AND SENTENCE IS REQUIRED IF ARTICLE 36 IS VIOLATED

If a foreign national is convicted absent compliance with the notification obligation of Article 36, the rights of both the Sending State and the foreign national are implicated, and the conviction must be reviewed. Article 36 provides in a second paragraph: "The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full

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[14] *Breard v. Greene*, 523 U.S. 371, 376 (1998).

[15] *LaGrand (F.R.G. v U.S.)*, 2001 I.C.J. 104 (Jun. 27), para 77.

effect to be given to the purposes for which the rights accorded under this Article are intended".[16]

The ICJ has addressed required remedies, first in *LaGrand* in 2001, and more recently, on March 31, 2004, in *Avena and other Mexican Nationals.*[17] In Article 36, paragraph 2, the ICJ found an obligation to allow a foreign national to seek a remedy: "The Court cannot accept the argument of the United States which proceeds, in part, on the assumption that paragraph 2 of Article 36 applies only to the rights of the sending State and not also to those of the detained individual".[18]

The ICJ held that where the notification obligation under Article 36 has not been observed, action on the criminal conviction is required: "if the United States . . . should fail in its obligation of consular notification to the detriment of German nationals, an apology would not suffice in cases where the individuals concerned have been subjected to prolonged detention or convicted and sentenced to severe penalties. In the case of such a conviction and sentence, it would be incumbent upon the United States to allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention".[19]

The ICJ subsequently affirmed in *Avena* the requirement for review and reconsideration of a breach of Article 36 rights. The Court considered "that it is the judicial process that is suited to this task".[20] Contrary to the argument of the US,

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[16] VCCR, Article 36, para. 2.
[17] *Avena and other Mexican Nationals (Mex. v. U.S.),* 2004 I.C.J. 128 (Mar. 31).
[18] LaGrand, para. 89.
[19] *Id.* para. 125.
[20] *Id.* para. 141.

the Court stated that consideration by way of executive clemency does not suffice in view of the fact that the clemency process, as currently practiced in the US, does not appear to meet the requirements and it is therefore not sufficient in itself to serve as an appropriate means of "review and reconsideration".[21]

IV. REVIEW MUST TAKE ACCOUNT OF THE VIOLATION

Review and reconsideration is required even absent a showing that a different result would have been achieved had a consul intervened. As indicated above, a consul may act in a variety of ways in a particular case. After a person has been convicted without being informed of the right of consular access, it may be impossible to determine what impact a consul might have had on the proceedings.

Article 36, by requiring consular access, presumes that it will help a foreign national. The ICJ stated in *Avena*, "The question of whether the violations of Article 36, paragraph 1, are to be regarded as having, in the causal sequence of events, ultimately led to convictions and severe penalties is an integral part of criminal proceedings before the courts of the United States and is for them to determine in the process of review and reconsideration. In so doing, it is for the courts of the United States to examine the facts, and in particular the prejudice and its causes, taking account of the violation of the rights set forth in the Convention".[22]

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[21] *Avena*, para. 143.
[22] *Avena* para. 122.

V. RULES ON DEFAULT MAY NOT BE APPLIED

The ICJ ruled that treaty obligations require that rights be enforced at whatever point in time it remains possible to do so, regardless of rules on procedural default. "The problem arises," the ICJ stated, "when the procedural default rule does not allow the detained individual to challenge a conviction and sentence by claiming, in reliance on Article 36, paragraph 1, of the Convention, that the competent national authorities failed to comply with their obligation to provide the requisite consular information 'without delay,' thus preventing the person from seeking and obtaining consular assistance from the Sending State".[23] The ICJ concluded on the facts of the *LaGrand* case, "Under these circumstances, the procedural default rule had the effect of preventing 'full effect [from being] given to the purposes for which the rights accorded under this article are intended,' and thus violated paragraph 2 of Article 36".[24]

Expanding upon this position, the ICJ in *Avena* asserted that "[t]he crucial point in this situation is that, by the operation of the procedural default rule as it is applied at present, the defendant is effectively barred from raising the issue of the violation of his rights under Article 36 of the Vienna Convention and is limited to seeking the vindication of his rights under the United States Constitution".[25]

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[23] *LaGrand*, para. 90.
[24] *Id.* para. 91.
[25] *Avena*, para. 134.

VI. CONSULAR ACCESS IS A RIGHT UNDER CUSTOMARY INTERNATIONAL LAW

The rights of a foreign national as provided in Article 36 are part of the corpus of customary international law. Indeed, the United States accepts that consular access is required by a customary norm and it "looks to customary international law as a basis for insisting upon adherence to the right of consular notification, even in the case of countries not party to the VCCR or any relevant bilateral agreement." Consular notification is, in the view of the United States, "a universally accepted, basic obligation..."[26]

In addition to the widespread ratification of the VCCR, the customary character of the consular access right is evidenced by its inclusion in other international instruments. International norms and standards adopted by international bodies and organizations, including the United Nations, further reflect acceptance of the necessity for full respect and observance of the right to consular access.

While the VCCR is the foundational treaty that regulates consular relations, additional treaties, including a number ratified by the United States, incorporate the principle. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment requires States to punish those who commit torture. A torture suspect who is a foreign national "shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he is a national". [27]

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[26] DEPARTMENT OF STATE, CONSULAR NOTIFICATION AND ACCESS, at 44 (1998).

[27] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 6 (3), G.A. Res. 39/46, [annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984)], *entered into force* June 26, 1987.

Furthermore, a foreign national charged with a crime against a diplomat is entitled, by virtue of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents, to consular access.[28]

Since 2000, the Organization of American States General Assembly has also enshrined these principles in the resolution on *The Human Rights Of All Migrant Workers And Their Families.*[29]

Various U.N. bodies have further confirmed this fundamental principle. The U.N. General Assembly has affirmed the right to consular access in a number of resolutions. The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment states that a foreign national is entitled to consular access, and to be informed of that right.[30] In addition, the Declaration on the Human Rights of Individuals Who Are

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[28] Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Article 6, 28 U.S. Treaties 1977 (1973).

[29] *The Human Rights Of All Migrant Workers And Their Families,* AG/RES. 1717 (XXX-O/00) (Resolution adopted at the first plenary session, held on June 5, 2000); *The Human Rights Of All Migrant Workers And Their Families,* AG/RES. 1775 (XXXI-O/01) (Resolution adopted at the third plenary session, held on June 5, 2001); *The Human Rights Of All Migrant Workers And Their Families,* AG/RES. 1898 (XXXII-O/02) (Resolution adopted at the fourth plenary session held on June 4, 2002); *The Human Rights Of All Migrant Workers And Their Families,* AG/RES. 1928 (XXXIII-O/03), (Resolution adopted at the fourth plenary session, held on June 10, 2003); *The Human Rights Of All Migrant Workers And Their Families,* AG/RES. 2027 (XXXIV-O/04), (Resolution adopted at the fourth plenary session, held on June 8, 2004).

[30] Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 16, U.N. General Assembly Resolution 43/173 (1988).

Not Nationals of the Country in Which They Live views consular access as a right in the event of a detention.[31]

The U.N. General Assembly has "reaffirm[ed] emphatically the duty of States parties to the Vienna Convention on Consular Relations of 1963 to ensure full respect for and observance of the Convention, in particular with regard to the right of foreign nationals, regardless of their immigration status, to communicate with a consular official of their own State in the case of detention, and the obligation of the State in whose territory the detention occurs to inform the foreign national of that right".[32]

Both the U.N. Rules for the Protection of Juveniles Deprived of their Liberty[33] and the U.N. Standard Minimum Rules for the Treatment of Prisoners[34] provide that if a foreign national is arrested, the right of consular access must be respected.

VII. CONCLUSION

The EU considers the implementation of the right of consular access to be of utmost importance to members of the international community. Article 36, as construed by the ICJ, requires the review and reconsideration of the conviction and sentence in the present cases. When notification is omitted

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[31] Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live, Article 10, U.N. General Assembly Resolution 40/144 (1985).

[32] Protection of Migrants, U.N. General Assembly Resolution, A/RES/58/190 (Mar. 22, 2004), para. 10.

[33] G.A. res. 45/113, annex, 45 U.N. GAOR Supp. (No. 49A) at 205, U.N. Doc. A/45/49 (1990).

[34] Standard Minimum Rules for the Treatment of Prisoners, adopted Aug. 30, 1955, by the First U.N. Congress on the Prevention of Crime and the Treatment of Offenders, U.N. Doc. A/CONF/611, annex I, E.S.C. res. 663C, 24 U.N. ESCOR Supp. (No. 1) at 11, U.N. Doc. E/3048 (1957).

and a criminal conviction ensues, courts must provide a remedy. As the ICJ stated in *Avena*, "the remedy to make good these violations should consist in an obligation on the United States to permit review and reconsideration of these nationals' cases by the United States courts."[35]

In light of the international law norms articulated above, the EU, Liechtenstein, Norway and Switzerland respectfully support the position of Petitioners.

Respectfully Submitted,

S. Adele Shank
3380 Tremont Road
Columbus, Ohio 43221
614-326-1217
Counsel of Record

John B. Quigley
55 West 12th Avenue
Columbus, Ohio 43210
614-292-1764

Counsel to the European Union and Members of the International Community

[35] *Avena*, para. 121.

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Supreme Court of the United States

MARIO A. BUSTILLO,

Petitioner,

v.

GENE M. JOHNSON, Director,
Virginia Department of Corrections,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Virginia

MOISES SANCHEZ-LLAMAS,

Petitioner,

v.

STATE OF OREGON,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Oregon

BRIEF OF FORMER UNITED STATES DIPLOMATS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS MARIO A. BUSTILLO AND MOISES SANCHEZ-LLAMAS

JOSHUA RATNER
Of Counsel
WIGGIN AND DANA LLP
400 Atlantic Street
P.O. Box 110325
Stamford, CT 06911-0325
(203) 363-7635

HAROLD HONGJU KOH
Counsel of Record
ALLARD K. LOWENSTEIN
INTERNATIONAL HUMAN
RIGHTS CLINIC:
NATIONAL LITIGATION PROJECT
Yale Law School
127 Wall Street
New Haven, CT 06511
(203) 432-1660

December 22, 2005

Counsel for Amici Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF INTEREST	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. State Courts Disrupt the Diplomatic Interests of the United States When They Ignore the ICJ's Specific Holdings Construing Article 36 of the VCCR	4
II. State Courts Disrupt the Diplomatic Interests of the United States When They Ignore the ICJ's Rulings that Article 36 of the VCCR Creates Judicially Enforceable Individual Rights That Must Be Given Full Effect Despite Local Procedural Bars	18
A. The ICJ's Ruling Regarding Enforceable Rights Benefits U.S. Diplomatic Interests by Promoting Stricter Enforcement of the VCCR	18
B. The ICJ's Refusal To Recognize State Procedural Bars Benefits U.S. Diplomatic Interests	21
III. Allowing State Courts To Refuse To Enforce the *Avena* Ruling Also Would Damage U.S. Foreign Policy Interests Governed by Other Treaty Regimes	26
CONCLUSION	30

TABLE OF AUTHORITIES

Page

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Page

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TABLE OF AUTHORITIES – Continued

Page

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Page

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Page

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Page

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Page

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